

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1287

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE THE GRAND JURY
EMPANELLED OCTOBER 14, 1976

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

JOHN H. SHENEFIELD,
Acting Assistant Attorney General,

JOHN J. POWERS, III,
ROBERT E. HAUBERG, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.



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BRIEF FOR APPELLEE UNITED
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ISSUES PRESENTED

1. Whether the denial of a motion by a prospective grand jury witness for access to materials relating to a grand jury investigation is appealable as a "final decision" within the meaning of 28 U.S.C. §1291.
2. Whether the district court abused its discretion by declining to permit a prospective witness to examine, prior to testifying before the grand jury, materials relating to the grand jury investigation.

STATUTES AND RULES

Relevant to this appeal are Section 1291 of Title 28 of the United States Code and Rule 6(e) of the Federal Rules of Criminal Procedure.

Section 1291 provides, in relevant part, as follows:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States ..."

Rule 6(e) provides as follows:

"(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator or a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

STATEMENT

This is an appeal from an order denying a motion by Appellant, a prospective grand jury witness, to attain access

to certain materials which involve the subject matter of a grand jury investigation (A. 74a, 84a-85a). 1/ The grand jury was empanelled on October 14, 1976 and is conducting an investigation of possible criminal antitrust violations in the securities industry (A. 45a). The prospective witness is a prominent member of the New York Stock Exchange member firm (A. 20a) and is believed to possess information relevant to the grand jury's investigation.

During the fall of 1976, a witness testified before the grand jury concerning conversations he allegedly had had with Appellant on June 3, 1976, June 11, 1976 and June 28, 1976 (A. 45a-46a). Pursuant to a subpoena duces tecum, the witness produced for the grand jury a tape recording which he had made of the conversation of June 11, 1976 2/ and certain notes which he had made after the June 28 meeting (A. 45a-46a). The tape recording was played and a transcript of it was examined by the grand jury.

1/ "A." refers to the Joint Appendix.

2/ The tape recording was apparently made by the witness on his own initiative and without Appellant's knowledge. The tape recording has been transcribed (A. 46a).

After the witness' appearance before the grand jury, Government counsel contacted and interviewed Appellant but he claimed to have no specific recollection of either the conversations noted above or certain other conversations relevant to the grand jury's investigation (A. 46a). Thereafter, the grand jury issued and obtained service of a subpoena ad testificandum for Appellant in March, 1977 directing him to testify before the grand jury on March 22, 1977 (A. 46a). At his request, Appellant's appearance was adjourned from March 22 to April 12 (A. 46a). However, he did not appear before the grand jury at that time because his counsel sought and obtained an additional postponement of his appearance from Government counsel (A. 46a). In fact, throughout the months of April, May, and June 1977, Appellant's counsel repeatedly sought and obtained postponements of his grand jury appearance (A. 46a-48a).

During an April 19, 1977 conversation with Appellant's counsel, Government counsel indicated that a tape recording existed of the June 11 conversation and that notes had been made after the June 28 meeting (A. 47a). In addition, Appellant's counsel was also advised that Government counsel had conferred with the grand jury witness on June 14, 1977 and during that meeting had taken notes concerning what allegedly had been

discussed during the June 3, 1976 meeting between the witness and Appellant (A. 45a, 47a, 77a). The notes have remained in the possession of government counsel and, to date, have not been submitted to the grand jury (A. 45a). Government counsel may attempt to refresh Appellant's recollection by using the tape recording and the notes when he appears before the grand jury if he asserts under oath that he has no present recollection of any of the conversations in question. 3/

After learning of the existence of the tapes and notes, Appellant's counsel asked for permission to hear the tape recording or to examine the transcript of it prior to Appellant's appearance (A. 47a). After considering this request, Government counsel declined to produce the materials in question because "F.R.Cr.P. 6(e) and the impoundment order prohibited the witness' seeing the requested documents outside of the grand jury" (A. 47a). The impoundment order referred to by Government counsel had been filed at about the time the grand jury had been empanelled (A. 45a) and provides in relevant part as follows (A. 53a):

3/ An order of immunity has been prospectively obtained for Appellant (A. 42a). Whether he will be immunized cannot be determined until he actually appears before the Grand Jury.

IT IS FURTHER ORDERED that, upon making suitable arrangements with the attornyes of the Antitrust Division assigned to the matter, any person who has produced any of the documents impounded hereunder may have reasonable access, for inspection and copying, to the documents which he has produced. Such person, however, shall not have access to any other documents.

The grand jury witness who produced the tape recording and the notes has not consented to the disclosure of these materials to Appellant (A. 46a).

On June 27, 1977, the prospective witness was served with a new subpoena directing him to appear before the grand jury on June 29, 1977 (A. 48a-49a). On June 28, 1977, his counsel filed an application for an order directing the Government to show cause why Appellant should not, prior to his appearance before the grand jury, be granted access to the tape recording of the June 11, 1976 meeting, the notes of the June 28 meeting and the notes taken by the Government counsel on June 14, 1976 concerning the June 3, 1976 meeting between the grand jury witness and Appellant (A. 49a). As a result of this motion, Appellant's appearance before the grand jury was postponed until the motion to compel access was acted upon by the district court (A. 49a).

On June 30, 1977, Judge Richard Owen, after a hearing, denied Appellant's motion. He found that the Government was entitled to the "unvarnished recollection" of Appellant before

the grand jury and was not required to permit Appellant access to the materials so that he might better "prep" himself to testify and "see how things fit into the interstices of what somebody says he has said . . ." (A. 85a). Judge Owen noted that the principle case upon which Appellant relied, In re Braniff Airways, Inc., 390 F.Supp. 344 (W.D. Tex. 1975), was inapplicable to the circumstances here even if that case had been correctly decided (A. 84a). The present appeal followed from this determination. Because of vacation schedules, the grand jury is not sitting during the months of July and August. However, it plans to resume its investigation shortly after Labor Day and any further delays in Appellant's appearance could seriously disrupt the orderly progress of the investigation.

ARGUMENT

- I. THE DENIAL BY THE DISTRICT COURT OF APPELLANT'S MOTION TO DISCLOSE MATERIALS BEFORE THE GRAND JURY IS NOT APPEALABLE AS A FINAL ORDER UNDER 28 U.S.C. §1291.

This Court has jurisdiction under 28 U.S.C. §1291 only of appeals from "final" decisions of district courts. In Cobbledick v. United States, 309 U.S. 323, 327-28 (1940), the Court held that an order compelling testimony or the production of documents or things to a grand jury is interlocutory and not appealable as a "final" decision within the meaning of 28 U.S.C. §1291. See also United States v. Ryan, 402 U.S. 530, 532-33 (1971). The rule announced in Cobbledick is based on the need to prevent any disruptions or delays in the orderly progress of a grand jury investigation. 309 U.S. at 327-28. Thus, as this Court has recognized, Cobbledick

precludes "not only appeals from orders compelling testimony or the production of documents or things before the grand jury but all appeals that would have the effect of interfering with proceedings of the grand jury, except, of course, appeals from judgments of contempt." 9 Moore's Federal Practice, ¶110.13[11], at p. 192 (1975); Matter of Doe, 546 F.2d 498 (2d Cir. 1976); In re Grand Jury Investigation of Violations, 318 F.2d 533 (2d Cir. 1963). Since the order under appeal here arises out of an on going grand jury investigation and Appellant's appearance before that grand jury, the rule announced in Cobbledick precludes an appeal in the absence of a judgment of contempt. Id.

While Appellant has not addressed the jurisdictional issue in his brief, he asserts that unless he examines the materials in question prior to his appearance before the grand jury he may suffer "embarrassment or other more injurious penalties" (br., p. 25). 4/ However, such speculation does not provide any basis for appellate review of the order in question. If

4/ Appellant suggests that, were he indicted, he would be entitled to disclosure of the subject materials under Rule 16 of the Federal Rules of Criminal Procedure. Brief of Appellant at 27 n.*. Assuming, arguendo, appellant's assertion is correct, he would nonetheless not be entitled to appellate review of a district court order denying such disclosure prior to conviction. 9 Moore's Federal Practice, ¶110.13[11] at 193-94 (1975 ed.); Will v. United States, 389 U.S. 90 (1967). A fortiori, Appellant can obtain no greater right of appeal here where he has neither been indicted nor testified.

he appears before the grand jury, he may be able to testify fully and truthfully concerning the activities currently under investigation without having to have his memory refreshed by the materials in question. Cf. Matter of Doe, supra, 546 F.2d at 501. In any event, there is no reason to make any exception to the strong federal policy embodied in Section 1291 against piecemeal appeals in this case because if Appellant wishes to litigate the issues discussed in his brief he can do so simply by refusing to appear before the grand jury and being adjudicated in contempt. United States v. Ryan, supra; Cobbledick v. United States, supra; In re Grand Jury Investigation of Violations, supra, 318 F.2d at 535, 538; Shattuck v. Hoegl, 523 F.2d 509, 513 (2d Cir. 1975). Appellant's concern that he may be embarrassed by his grand jury appearance or otherwise suffer injury are not sufficient "to weaken the historic rule putting a witness' sincerity to the test of having to risk a contempt citation as a condition to appeal, however harsh its application may seem to appellant here." United States v. Fried, 386 F.2d 691, 695 (2d Cir. 1967); see also Kaufman v. Edelstein, 539 F.2d 811, 813-814 (2d Cir. 1976). Therefore, since this appeal is not an appeal from a judgment of contempt, it must be dismissed for lack of jurisdiction. 5/

5/ Appellant may well have additional remedies should any of his fears blossom into a criminal prosecution or other legal action. He may raise these same issues by motion in the district court at that time or by appeal from a conviction, if any, or other final judgment. See United States v. Calandra, 414 U.S. 338, 354-55 n. 10 (1974); Matter of Doe, supra, 546 F.2d at 501; In re Grand Jury for November, 1974 Term, 415 F.Supp. 242, 245 (W.D.N.Y. 1976).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO DISCLOSE MATERIALS BEFORE THE GRAND JURY.

Appellant contends that the subject tapes and notes now before the grand jury are not within the grand jury secrecy rule (Fed.R.Crim.Proc. 6(e)) and thus may be disclosed, or, if within it, sufficient need has been shown to require disclosure. Neither contention is supportable.

A. The Documents Are Within The Grand Jury Secrecy Rule.

The principle thrust of Appellant's argument is that the subject tape and notes, being "mere" documents, are not within the scope of Rule 6(e) as "matters occurring before the grand jury." Appellant misconceives the ambit of the protection against disclosure afforded by the Rule in two respects. First, the policy of secrecy of grand jury proceedings encompasses the documents here. Second, the limited exception to this policy when the documents are sought solely for their "intrinsic value" is inapplicable where, as here, the documents are inextricably bound to

5/ [continued] The existence of these multiple remedies thus makes it inappropriate as well for this Court to accept jurisdiction either under the "collateral order" exception to Section 1291 of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), see Matter of Doe, supra, 546 F.2d at 500-01; United States v. Fried, supra, 386 F.2d at 694, or by way of writ of mandamus. Will v. United States, supra. Finally, the limited exception to the finality rule in United States v. Nixon, 418 U.S. 683 (1974), is not applicable here. 418 U.S. at 690-692; Kaufman v. Edelstein, supra, 539 F.2d at 814.

evidence and testimony presented to an on going grand jury investigation, and their "intrinsic value" to Appellant relates entirely to that very investigation. 6/

1. Rule 6(e) encompasses the documents at issue.

Appellant contends that the tape and notes at issue are not protected from disclosure by Rule 6(e) because they "were not made in the grand jury room" (br. 13). However, the secrecy afforded to grand jury proceedings is not as limited as Appellant suggests. As this Court has recongized, "[d]ocuments as well as oral testimony ... may come within its [Rule 6(e)] proscription against disclosure." United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960).

Indeed, documents such as those at issue in this appeal must be protected against disclosure by Rule 6(e) in order to prevent a prospective grand jury witness from discovering the testimony

6/ Appellant has not revealed any property right in any of the materials in question or stated that the true owner of these materials has consented to his examination of them. In fact, neither the owner of these materials nor the Government has consented to Appellant's proposed examination of them (A. 46a). Under these circumstances, Appellant has no legal right to examine them even if Rule 6(e) is inapplicable. Cf. United States v. Interstate Dress Carriers, Inc., supra, 280 F.2d at 54; Corona Construction Co. v. Ampress Brick Co., Inc., 376 F.Supp. 598, 603 (N.D. Ill. 1974).

of prior grand jury witnesses. This is true because, as noted above, the documents in question are a recording of a conversation and notes to two additional conversations which are being used in an on going investigation of possible criminal violations of the federal antitrust laws. One set of notes was made by a participant in the conversation which allegedly involved Appellant and the tape recording was made by the same individual of another conversation he allegedly had with Appellant. 7/ The individual who prepared these notes and the tape has already testified before the grand jury concerning these conversations. Thus, disclosure of these materials would have the effect of disclosing the subject matter of his testimony before the grand jury. Such a result would violate not only the express language of Rule 6(e) but also seriously undermine the long recognized policy of conducting grand jury proceedings in secret embodied in that rule. 8/

7/ The other set of notes was prepared by Government counsel during an interview with the individual who later testified before the grand jury and must be considered attorney work product materials. Hickman v. Taylor, 329 U.S. 495 (1947). While "the work product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital." United States v. Nobles, 422 U.S. 225, 238 (1975). Thus, work product materials are discoverable only under carefully limited circumstances not present in this case.

8/ The impoundment order entered by the district court is also designed to effectuate this policy of secrecy by providing that a person who produces documents to the grand jury can have access to only those documents but to no others (see p. 6, supra). Appellant certainly has no greater rights.

See generally In re Grand Jury Proceedings, 309 F.2d 440, 443-44 (3d Cir. 1962); In re April 1956 Term Grand Jury, 239 F.2d 263, 271-72 (7th Cir. 1956); In re Blue Ribbon Frozen Food Corp., 414 F.Supp. 399 (D.Conn. 1976); Corona Construction Co. v. Ampress Brick Co., Inc., supra, 376 F.Supp. at 600-602; United States v. Stein, 18 F.R.D. 17, 19 (S.D.N.Y. 1955); Orfield, The Federal Grand Jury, 22 F.R.D. 343, 455 (1958). 9/

2. The documents here are not within the "intrinsic value" exception to Rule 6(e).

Appellant urges this Court to permit him access to the subject tapes and notes so that he may use them to prepare himself for an appearance before the same grand jury that has already heard testimony by a witness about the same subject matter revealed in the documents and the tape recording. No court has ever condoned such a disregard for the strictures

9/ The cases relied on by appellant are not the contrary. Rather, in each case the court was careful to distinguish the circumstances there from situations like the instant controversy. Thus, in United States v. Interstate Dress Carriers, Inc., supra, this Court found that disclosure under the facts before it would "... in no way impinge upon the secrecy of the grand jury's deliberations." 280 F.2d at 54. In Davis v. Romney, 55 F.R.D. 337 (E.D.Pa. 1972), the court noted that "[t]he file binders exist as entity apart from the grand jury; the information contained therein does not reflect upon and is not inextricably intertwined with the deliberations or work of the grand jury." Id. at 341. Appellant's contention, then, fails by the weight of the very authority upon which he relies.

of Rule 6(e). ^{10/} In United States v. Interstate Dress Carriers, Inc., supra, this Court carefully phrased the question presented as " . . . whether Rule 6(e) . . . prohibits a government agency authorized by statute to examine the financial records of persons subject to regulation by it, from inspecting these records" 280 F.2d at 53 (emphasis added). The question was answered in the negative only after finding that the documents were sought by the agency because they had an "intrinsic value in furtherance of a lawful investigation - rather than to learn what took place before the grand jury. . . ." 280 F.2d at 54.

The documents at issue in this case are not being sought for their "intrinsic value in the furtherance of a lawful investigation . . ." Id. at 54. Rather, as Appellant concedes, they are being sought so that he can use them to prepare for his appearance before the same grand jury which obtained the documents and heard the testimony of the witness who produced them.

^{10/} In re Braniff Airways, Inc., 390 F.Supp. 344 (W.D. Tex. 1975) is not to the contrary. In that case two witnesses were permitted to review their own prior testimony taken nineteen months previously and concerning events that occurred four to eight years earlier. Each witness had already testified twice before the grand jury without prior access to any of the documents, minutes or other evidence occurring before the grand jury. The court, after noting that the transcripts would permit each witness to refresh his memory concerning "matters previously explored with him" by the grand jury, explicitly limited its ruling to the "peculiar circumstances of this case . . ." Id. at 347 (emphasis added). Those circumstances are not present in this appeal.

The effect, if not the intent, of disclosure of the documents here to Appellant, a potential target of the investigation, would be to achieve indirectly what may not be accomplished directly under Rule 6(e). See generally Corona Construction Co. v. Ampress Brick Co., Inc., supra, 376 F.Supp. at 601-02; Davis v. Romney, supra, In re Hearing Before the Committee on Banking and Currency of the United States Senate, 19 F.R.D. 410, 412 (N.D. Ill. 1956); vacated on other grounds, 245 F.2d 667 (7th Cir. 1957). Appellant is not entitled to this result by unwarranted distinctions between what are and are not "matters occurring before the grand jury."

B. The District Court Did Not Err In Finding Appellant's Showing Of Need Insufficient To Merit Disclosure.

It is well-established that disclosure of grand jury materials protected by Rule 6(e) may be permitted only upon a showing of "particularized need" or "compelling necessity." 11/ Dennis v.

11/ Appellant suggests that the requisite showing of need in this case should be less demanding than the settled rule of compelling need. There is no basis in law or logic for such a distinction. Where, as here, the disclosure of documents will reveal matters presently being considered by the grand jury, as well as the essence of a material portion of a witness' testimony before that body, the deleterious effect of disclosure will not vary with the description of the material being revealed. See, e.g., Corona Construction Co. v. Ampress Brick Co., Inc., supra; United States v. Stein, supra. Rather, if anything, a more demanding standard is appropriate where the materials are being examined by an on-going grand jury and their intended use by a proponent for disclosure involves that very investigation. See Dennis v. United States, 384 U.S. 855, 870 (1967); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940); Davis v. Romney, supra, 55 F.R.D. at 342; 1 Wright, Federal Practice and Procedure, Criminal §106, at 170 (1969 ed.).

United States, 384 U.S. 855 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399-400 (1959); Smith v. United States, 423 U.S. 1303, 1304 (Douglas, Circuit Justice 1975). Even in those cases where disclosure is permitted, it only may be done "discretely and limitedly." Dennis v. United States, *supra*; United States v. Proctor & Gamble, 356 U.S. 677, 683 (1958). Whether disclosure is proper in any given situation is a question largely reserved for the discretion of the trial judge. Pittsburgh Plate Glass Co. v. United States, *supra*; Allis-Chalmers Mfg. Co. v. City of Fort Pierce, Florida, 323 F.2d 233, 241-42 (5th Cir. 1963); Atlantic City Electric Company v. A.B. Chance Company, 313 F.2d 431, 434 (2d Cir. 1963). Appellant has not established that the district court erred, much less abused its discretion, in denying Appellant's motion for disclosure.

The grand jury is given wide latitude to inquire into possible violations of criminal law. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiry is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation" United States v. Calandra, *supra*, 414 U.S. at 343; quoting Blair v. United States, 250 U.S. 273, 282 (1919). No witness called to testify before the grand jury is entitled to set limits on the scope or manner of conducting that investigation.

United States v. Dionisio, 410 U.S. 1, 15 (1973). Appellant seeks to impose such limits by foreclosing the grand jury's opportunity to test his unreconstructed memory, as well as to receive his spontaneous recollection, should it ultimately need to be refreshed. Judge Owen properly rejected appellant's motion for this very reason (A. 84a-85a). Indeed, any other result would seriously undermine the grand jury's historic investigative function by increasing the possibility that prospective grand jury witnesses will be able to carefully rehearse and perhaps, in some cases, fabricate their testimony prior to their appearance because they will already be aware of evidence in the grand jury's possession which involves them.

Appellant would prefer to testify only after afforded an opportunity to study and analyze the subject documents. He maintains that to deny him this opportunity may cause him to appear to commit perjury and to embarrass himself before the grand jury. These possibilities are present every time a grand jury witness testifies. These inchoate fears and assertions do not establish a particularized need justifying a breach of grand jury secrecy. 12/

12/ As Judge Owen noted (A. 84a), In re Braniff Airways, Inc., supra, is wholly distinguishable from the circumstances here. In that case, the witnesses had twice appeared before the grand jury and testified, without the aid of prior disclosure, about matters occurring four to eight years previously. The Appellant here has yet to testify under oath concerning events barely one year old. See discussion supra, at p. 14; n. 10.

United States v. Calandra, supra, 414 U.S. at 345, 353; Smith v. United States, supra; United States v. Del Toro, 513 F.2d 656, 664 (2d Cir. 1975), cert. denied, 423 U.S. 826. Thus, Judge Owen did not abuse his discretion in declining to order production of the materials in question. 13/

CONCLUSION

For the foregoing reasons, the appeal should be dismissed. Alternatively, the order of the district court should be affirmed.

Respectfully submitted.

JOHN H. SHENEFIELD,
Acting Assistant Attorney General,

JOHN J. POWERS, III,
ROBERT E. HAUBERG, JR.,
Attorneys, *
Department of Justice,
Washington, D.C. 20530.

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13/ The Government was under no legal obligation to disclose the existence of the materials in question prior to Appellant's appearance. It did so in an attempt to encourage Appellant to recall the conversations recorded in these materials. Since Rule 6(e) expressly authorizes Government attorneys to use grand jury materials "in the performance of their duties," we fail to see how the limited use made of the materials in question in an attempt to refresh Appellant's recollection and thus obtain relevant evidence removes the documents from the protection of Rule 6(e). See generally United States v. Proctor & Gamble, supra, 356 U.S. at 683; United States v. Johnson, 337 F.2d 180, 197 (4th Cir. 1964), cert. denied as to some defendants, 385 U.S. 846, 889, aff'd as to remaining defendants, 383 U.S. 169 (1966).

* We wish to acknowledge the substantial contribution made to the writing of this brief by Frederick R. Dettmer who is currently employed at the Department of Justice and will enter his third year at the Yale Law School this fall.

CERTIFICATE OF SERVICE

I, John J. Powers, III, hereby certify that I have on this 3rd day of August, 1977, served by mail, postage prepaid, a copy of the BRIEF FOR THE UNITED STATES OF AMERICA upon the following person:

Stephen R. Steinberg
Reavis & McGrath
345 Park Avenue
New York, New York 10022

John J. Powers, III
JOHN J. POWERS, III
Attorney,
Department of Justice,
Washington, D.C. 20530.